

**PLAINTIFFS'
OPPOSITION TO
GOOGLE'S MOTION
FOR LEAVE TO
FILE AN EXTRA
DAUBERT MOTION
AFTER THE
DEADLINE FOR
DAUBERT MOTIONS**

**Redacted Version of
Document Sought to
be Sealed**

BOIES SCHILLER FLEXNER LLP

David Boies (admitted pro hac vice)

333 Main Street

Armonk, NY 10504

Tel: (914) 749-8200

dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165

Beko Reblitz-Richardson, CA Bar No.
238027

44 Montgomery St., 41st Floor

San Francisco, CA 94104

Tel.: (415) 293-6800

mmao@bsfllp.com

brichardson@bsfllp.com

James Lee (admitted pro hac vice)

Rossana Baeza (admitted pro hac vice)

100 SE 2nd St., 28th Floor

Miami, FL 33131

Tel.: (305) 539-8400

jlee@bsfllp.com

rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334

M. Logan Wright, CA Bar No. 349004

725 S Figueroa St., 31st Floor

Los Angeles, CA 90017

Tel.: (213) 995-5720

alanderson@bsfllp.com

mwright@bsfllp.com

SUSMAN GODFREY L.L.P.

Bill Carmody (admitted pro hac vice)

Shawn J. Rabin (admitted pro hac vice)

Steven M. Shepard (admitted pro hac vice)

Alexander Frawley (admitted pro hac vice)

1301 Avenue of the Americas, 32nd Floor

New York, NY 10019

Tel.: (212) 336-8330

bcarmody@susmangodfrey.com

srabin@susmangodfrey.com

sshepard@susmangodfrey.com

afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891

1900 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

Tel.: (310) 789-3100

abonn@susmangodfrey.com

MORGAN & MORGAN

John A. Yanchunis (admitted pro hac vice)

Ryan J. McGee (admitted pro hac vice)

201 N. Franklin Street, 7th Floor

Tampa, FL 33602

Tel.: (813) 223-5505

jyanchunis@forthepeople.com

rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805

711 Van Ness Ave, Suite 500

San Francisco, CA 94102

Tel: (415) 358-6913

mram@forthepeople.com

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all other similarly
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' OPPOSITION TO
GOOGLE'S MOTION FOR LEAVE TO
FILE AN EXTRA DAUBERT MOTION
AFTER THE DEADLINE FOR DAUBERT
MOTIONS**

Judge: Hon. Yvonne Gonzalez Rogers

Trial Date: November 6, 2023

I. INTRODUCTION

On June 20, 2023, Plaintiffs’ technical expert Jonathan Hochman served a 19-page supplemental report to address evidence that only came to light during the second round of discovery sanctions, which concluded in March 2023. As Mr. Hochman explains:

I am not offering any new opinions in this report. The purpose of this report is to explain how the new information Google provided further substantiates several opinions I already offered in my April 15, 2022 opening report and my June 7, 2022 rebuttal and supplemental report.

Ex. 1 ¶ 3. His report primarily addresses two categories of information: a new private browsing detection bit, and additional logs that contain such bits. Google cannot (and does not) take issue with Mr. Hochman serving a supplemental report to address this material. Google instead seeks leave to file an extra *Daubert* motion against a portion of the supplemental report.

Leave should be denied for three independent reasons. *First*, having used up its allotted three *Dauberts*, Google lacks good cause to file a fourth. The timing of Mr. Hochman’s supplement was driven by Google’s discovery misconduct. To grant leave would reward that misconduct with an extra *Daubert*. *Second*, Google missed the agreed upon August 24 deadline for *Daubert* motions. Google received Mr. Hochman’s supplemental report in June—yet offers no excuse for its failure to meet the parties’ agreed deadline. *Third*, the proposed *Daubert* motion is meritless. Google’s motion for leave mischaracterizes the report, ignoring Mr. Hochman’s technical analysis of the new evidence. Google focuses entirely on a small portion where Mr. Hochman addresses Google’s investigation into its private browsing detection bits and explains how Google could have done more. But that analysis is relevant and proper expert testimony. Where a party has been sanctioned and the jury is permitted to draw an adverse inference, expert testimony can “help[] the jury decide whether to draw an adverse inference—as it was instructed it could do.” *GN Netcom, Inc. v. Plantronics*, 930 F.3d 76, 86 (3d Cir. 2019). Mr. Hochman’s opinions are “probative of whether evidence contained [in the withheld logs] would have been unfavorable” to Google. *Zucchella v. Olympusat, Inc.*, 2023 WL 2628107, at *8 (C.D. Cal. Jan. 10, 2023) (case Google cited). The opinions are also relevant to Plaintiffs’ prayer for injunctive relief, and the Court should rely on them in evaluating and crafting the injunctive relief.

II. ARGUMENT

A. Google's Sanctioned Discovery Misconduct Should Not Be Rewarded.

Google cannot demonstrate good cause to file a fourth *Daubert* motion against the supplemental Hochman report because Google's discovery misconduct is what prompted the need for the supplemental report. The new report addresses material that only came to light during the second sanctions proceedings. As explained in Magistrate Judge van Keulen's March 20, 2023 order sanctioning Google (for the second time): "Google's untimely disclosure of [REDACTED] New Logs shows that the discovery violations addressed in the May [20]22 Sanctions Order were far more extensive, and thus more prejudicial, than was then known." Dkt. 898 at 9. That sanctions order followed the initial May 2022 sanctions order, where Magistrate Judge van Keulen found that "Google's unjustified failure to provide information regarding the Incognito detection bits during discovery was improper and constitutes discovery misconduct." Dkt. 588-1 at 29.

To allow Google an extra *Daubert* motion would reward Google for that "discovery misconduct." If Google had complied with its discovery obligations, Mr. Hochman would have addressed the evidence in his earlier reports, and Google would have needed to decide whether to use a *Daubert* against him. As Mr. Hochman explains, "Had I known about this information when I prepared those reports, I would have relied on it in further support of the opinions offered." Ex. 1 ¶ 3. Granting this motion would put Google in a better position than it would have been if Google had complied. Not surprisingly, *none* of Google's cases address a scenario like this one, where the moving party is seeking leave to unwind its own misconduct.¹

¹ In two of Google's cases, there was an already pending *Daubert* motion against the expert who submitted the new report (unlike here), and the moving party sought leave to explain why the new report was subject to exclusion. *See Image Processing Techs., LLC v. Samsung Elecs. Co.*, 2020 WL 2395928, at *2 (E.D. Tex. May 12, 2020) ("Samsung argues that these updated opinions should be struck for reasons provided in their Prior Motion to Strike."); *Miller v. Glaxosmithkline*, 2007 WL 1662778, at *3 (N.D. Okla. June 5, 2007) ("Defendant will be allowed to supplement its *Daubert* motions . . ."). *Senne v. Kansas City Royals Baseball Corp.*, 591 F. Supp. 3d 453, 477 (N.D. Cal. 2022) addressed an "inadvertent" failure to comply with the court's Standing Order. Finally, *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 1997 WL 38112, at *2 (D. Kan. Jan. 24, 1997) is inapposite because that case addressed a request for a hearing under Federal Rule of Evidence 104(a), which is not at issue here.

B. Google Missed the Deadline for *Daubert* Motions, Without Any Excuse.

Even if Google had good cause to file an extra *Daubert*, the motion for leave should be denied because Google missed the agreed upon August 24 deadline for *Daubert* motions. That agreement was memorialized in the July 17 CMC Statement (a month after Mr. Hochman served the report). Dkt. 960.² This Court acknowledged the parties' schedule at the August 3 conference. Tr. at 4:15-21. Plaintiffs complied with that deadline and filed their *Daubert* motion on August 24. Dkt. 976. But Google did not even mention its desire to seek another *Daubert* until after August 24, and Google waited until September 1 to file its motion for leave—over a week late. That delay should not be excused. “[A] scheduling order may be modified only for good cause and with the judge’s consent. In order to determine whether good cause exists, courts primarily consider the diligence of the party seeking the modification.” *Brilliant Instruments, Inc. v. Guidetech*, 2011 WL 1628017, at *2 (N.D. Cal. Apr. 29, 2011). Google’s motion for leave does not even explain why it waited until after the stipulated deadline, let alone prove diligence.

The two-month gap between Google’s receipt of the supplemental Hochman report and Google’s motion for leave undermines any claim that Google acted diligently. *See Brilliant*, 2011 WL 1628017, at *2 (denying leave to file late *Daubert* motion where the moving party “was served with [the] expert report on January 28,” and missed an April 1 deadline for filing *Dauberts*); *Vomund v. Signor Trucking, Inc.*, 2009 WL 1562835, at *2 (D. Neb. May 28, 2009) (denying leave to file late *Daubert* motion where the deadline was February 26, and the moving party “ha[d] been aware of the [] issue” “since, at the latest, February 6”).

Google’s argument that Plaintiffs “excessively delayed in filing” Mr. Hochman’s supplemental report is both factually incorrect and legally irrelevant. Mot. at 3. The report does not exclusively “pertain[] to evidence that Google produced in December 2022 and June 2022.” Mot. at 2. The report also addresses material that Google provided in 2023. Ex. 1 ¶ 39. More

² The Case Management Statement has a section addressing deadlines for “*Daubert* Motions.” Dkt. 960 at 5. August 24 is listed as the deadline for “Plaintiffs’ Motions.” *Id.* The CMC Statement singled out “Plaintiffs” because Google already used up its three *Daubert* motions, and Google at no point stated that it would seek to file an additional *Daubert* motion.

1 fundamentally, Google cannot credibly blame Mr. Hochman for submitting the report “far after
 2 the close of expert discovery.” Mot. at 1. The timing was driven by Google’s misconduct. In any
 3 event, the only question for this motion is whether *Google* was diligent, so that its failure to meet
 4 the deadline should be excused. “To show good cause a party must show the scheduling deadlines
 5 could not be met, despite the *moving party’s* diligent efforts.” *HRH LLC v. Teton Cnty*, 2021 WL
 6 8999321, at *2 (D. Wyo. Feb. 18, 2021) (emphasis added) (denying leave file late *Daubert*).
 7 Google has not been diligent, so leave should be denied.

8 **C. Google’s Proposed *Daubert* Motion Is Meritless.**

9 Finally, leave should also be denied because the proposed *Daubert* motion should fail.
 10 Google’s motion for leave paints a misleading picture of the supplemental report (without even
 11 attaching it). *See* Ex. 1 (attached here). The report is not “largely improper attorney argument
 12 about Google’s alleged failures in the discovery process.” Mot. at 1. Rather, Mr. Hochman
 13 assesses, among other topics: (1) how the newly disclosed [REDACTED] bit “is different
 14 from the [REDACTED] previously disclosed Incognito detection bits”; (2) how “the revelation of yet
 15 another detection bit is further proof that Google intercepts, stores, and uses private browsing
 16 data”; (3) how “[t]he newly disclosed [REDACTED] logs support my opinions about how private browsing
 17 data is identifying,” particularly because “Google stores private browsing data in the same log as
 18 regular browsing data”; (4) how “[t]he newly disclosed [REDACTED] logs also support my opinions about
 19 how Google uses private browsing data to enrich itself”; and (5) how “these [REDACTED] logs, and the uses
 20 of the data which they reveal, provide additional pathways for the Court to fashion injunctive
 21 relief, should the Court choose to do.” Ex. 1 ¶¶ 13, 23, 43, 47, 49. Google’s motion for leave
 22 does not even mention these technical opinions, let alone argue they are improper.

23 Google instead focuses on a small portion of the report, where Mr. Hochman explains
 24 how Google “could have conducted” a more “comprehensive investigation” into private
 25 browsing detection bits through a “variety of ways.” Ex. 1 ¶ 39. Google argues “[t]here is no
 26 need to relitigate these issues and explain the foundational facts to the jury on an issue the Court
 27 has already decided.” Mot. at 2 (citation omitted). As a threshold matter, that argument implicitly
 28

concedes that an adverse-inference jury instruction remains appropriate. If Google’s position is that “the Court has already decided” the sanctions issues, then Google should not challenge Magistrate Judge van Keulen’s recommended jury instruction.

In any event, Google misunderstands the relevance of Mr. Hochman’s opinions. His discussion of Google’s investigation into private browsing detection bits is “highly probative of whether the jury should adopt the permissive adverse inference” that Judge van Keulen recommended. *Plantronics*, 930 F.3d at 85. *Plantronics* is squarely on point. The trial court found spoliation and ordered an adverse-inference jury instruction, but excluded expert testimony addressing the spoliation. The Third Circuit reversed and ordered a new trial, holding the court “abused its discretion in excluding [] expert testimony regarding Plantronics’ spoliation,” which was “undoubtedly relevant.” *Id.* at 85-86. The “proposed testimony would have tended to show that the scope of [the] spoliation was more significant than Plantronics had represented, thereby helping the jury decide whether to draw an adverse inference—as it was instructed it could do.” *Id.* Mr. Hochman’s opinions are relevant for the same reasons. Magistrate Judge van Keulen recommended a permissive adverse-inference instruction: “The jury *may* infer from Google’s failure to disclose these data sources that they are not helpful to Google.” Dkt. 898 at 13. The jury will decide for itself whether to draw that inference, and Mr. Hochman’s analysis will “help[] provide the jury with a fuller picture.” *Plantronics*, 930 F.3d at 86. Only one of Google’s cases addresses expert testimony related to discovery misconduct, and that case supports Plaintiffs. *See Zucchella*, 2023 WL 2628107, at *8. Mr. Hochman’s testimony is “probative of whether evidence contained [in the logs] would have been unfavorable” to Google. *Id.*³

III. CONCLUSION

Plaintiffs respectfully ask the Court to deny Google’s untimely motion for leave.

³ The other cases turned on forms of expert testimony not at issue here. *See Nationwide Transport v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (expert offered a legal opinion “apply[ing] the UCC to the facts of this case”); *DePaepe v. General Motors*, 141 F.3d 715, 720 (7th Cir. 1998) (expert opined that the defendant “had a particular motive”). And *United States v. Bacon*, 979 F.3d 766, 769 (9th Cir. 2020) simply addressed how the Court of Appeals may remedy erroneous *Daubert* rulings.

1 Dated: September 5, 2023

2 By /s/ Mark Mao

3 Mark C. Mao (CA Bar No. 236165)
mmao@bsfllp.com

4 Beko Reblitz-Richardson (CA Bar No. 238027)
brichardson@bsfllp.com
5 BOIES SCHILLER FLEXNER LLP
6 44 Montgomery Street, 41st Floor
7 San Francisco, CA 94104
8 Telephone: (415) 293 6858
9 Facsimile (415) 999 9695

10 David Boies (*pro hac vice*)
dboies@bsfllp.com
11 BOIES SCHILLER FLEXNER LLP
12 333 Main Street
13 Armonk, NY 10504
14 Tel: (914) 749-8200

15 James W. Lee (*pro hac vice*)
jlee@bsfllp.com
16 Rossana Baeza (*pro hac vice*)
rbaeza@bsfllp.com
17 BOIES SCHILLER FLEXNER LLP
18 100 SE 2nd Street, Suite 2800
19 Miami, FL 33130
20 Telephone: (305) 539-8400
21 Facsimile: (305) 539-1304

22 Alison Anderson (CA Bar No. 275334)
aanderson@bsfllp.com
23 M. Logan Wright, CA Bar No. 349004
mwright@bsfllp.com
24 BOIES SCHILLER FLEXNER LLP
25 725 S Figueroa Street
26 31st Floor
27 Los Angeles, CA 90017
28 Telephone: (213) 995-5720

Amanda Bonn (CA Bar No. 270891)
abonn@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100

Bill Christopher Carmody (*pro hac vice*)
bcarmody@susmangodfrey.com
Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com

1 Steven Shepard (*pro hac vice*)
2 sshepard@susmangodfrey.com
3 Alexander P. Frawley (*pro hac vice*)
4 afrawley@susmangodfrey.com
5 Ryan Sila (*pro hac vice*)
6 rsila@susmangodfrey.com
7 SUSMAN GODFREY L.L.P.
8 1301 Avenue of the Americas, 32nd Floor
9 New York, NY 10019
10 Telephone: (212) 336-8330

11 John A. Yanchunis (*pro hac vice*)
12 jyanchunis@forthepeople.com
13 Ryan J. McGee (*pro hac vice*)
14 rmcgee@forthepeople.com
15 MORGAN & MORGAN, P.A.
16 201 N Franklin Street, 7th Floor
17 Tampa, FL 33602
18 Telephone: (813) 223-5505
19 Facsimile: (813) 222-4736

20 Michael F. Ram, CA Bar No. 104805
21 mram@forthepeople.com
22 MORGAN & MORGAN
23 711 Van Ness Ave, Suite 500
24 San Francisco, CA 94102
25 Tel: (415) 358-6913

26 *Attorneys for Plaintiffs*
27